

LAW OFFICE OF
GARO B. GHAZARIAN
State Bar No. 152790
15915 Ventura Blvd., Suite 203
Encino, California 91436
Tel: (818)905-6484
Fax: (818)905-6481

Attorney for Defendant
ARA E. AVETYANTS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE ROGER T. BENITEZ)

UNITED STATES OF AMERICA,) No. CR 08-1455 BEN
Plaintiff,)
) **DEFENDANT AVETYANTS' REPLY TO THE**
) **GOVERNMENT'S OPPOSITION TO**
v.) **DEFENDANT AVETYANTS' MOTION TO**
) **SUPPRESS EVIDENCE AND STATEMENTS;**
ARA E. AVETYANTS, et al.) **DECLARATION OF DEFENDANT AVETYANTS**
Defendants.) **IN SUPPORT THEREOF**
)

Date: September 12, 2008
Time: 2:00 p.m.

Defendant ARA E. AVETYANTS, by and through his counsel of record, GARO B. GHAZARIAN, hereby submits his reply to the Government's opposition to his motion for suppression of evidence and statements.

This reply is based upon the attached memorandum of points and authorities, declaration of defendant ARA E. AVETYANTS, defendant ARA E. AVETYANTS' motion for suppression of evidence and statements, the Government's opposition to defendant's motion for suppression of evidence and statements, the files and records in this case, and on such further evidence and/or argument as may be presented at hearing on this motion.

1 Dated: September 3, 2008

Respectfully submitted,

2 /s/ Garo Ghazarian

3 GARO B. GHAZARIAN

4 Attorney for Defendant

5 ARA E. AVETYANTS

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

MEMORANDUM OF POINTS AND AUTHORITIES**I.****INTRODUCTION**

Faced with a scenario that strongly suggests overreaching by its agents, the Government nonetheless insists that its initial stop of the vehicle was lawful; its second stop of the defendant was lawful; and, its search and seizure of the fruits of that search lawful since the defendant gave consent. The Government further contends that defendant AVETYANTS was not in custody for the purposes of Miranda.

The facts before this Court flatly refute the Government's characterization of the encounters as lawful and unobtrusive. Both the first and the second stops were illegal and all evidence obtained as a result must be suppressed.

II.**THE INITIAL STOP OF DEFENDANT AVETYANTS WAS NOT
BASED ON ARTICULABLE SUSPICION**

The Government characterizes the initial stop as lawful. However, the stop itself is suspect. Law enforcement must justify the detention with specific articulable facts that create a reasonable suspicion that the person stopped has been, is, or is about to be engaged in criminal activity. United States v. Cortez, (1981) 449 U.S. 411, 417; United States v. Brignoni-Ponce, (1975) 422 U.S. 873, 884. This, the Government has failed to do.

1 The Government heavily relies on Brignoni-Ponce, supra. It
2 should be noted that the facts of this case are different from
3 Brignoni-Ponce. In Brignoni-Ponce, as part of its regular
4 traffic-checking operations in Southern California, the Border
5 Patrol operated a fixed checkpoint on interstate highway 5
6 south of San Clamente. On the evening of the night in question,
7 the fixed checkpoint was closed because of inclement weather,
8 but two officers were observing northbound traffic from a
9 patrol car parked at the side of the highway. The road was
10 dark, and they were using the patrol car's headlights to
11 illuminate passing cars. They pursued defendant's car and
12 stopped it because its three occupants appeared to be of
13 Mexican descent. Id. page 875. On certiorari, the court
14 affirmed the judgment of the appellate court which reversed
15 defendant's conviction on grounds of an illegal stop by the
16 border patrol, holding that officers could stop vehicles only
17 if they were aware of specific articulable facts, together with
18 rational inferences from those facts, that reasonably warranted
19 suspicion that the vehicles contained illegal aliens. The
20 apparent Mexican ancestry of the occupants did not furnish
21 reasonable grounds to believe that the three occupants were
22 aliens.

23 Here, the Government claims that:

- 24 1. The location where the car was stopped was in very
25 close proximity to the border.
- 26 2. There were multiple occupants in a 2008 BMW 5 series,
27 which is a highly unusual vehicle for this area.
- 28 3. The vehicle had no license plates.

4. The behavior of the occupants, throwing items out of the window, particularly documents such as receipts and banking documents.

The above asserted facts by the Government do not rise to the level of reasonable articulable suspicion. The Government improperly relies heavily on Brignoni-Ponce. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located near the border. Brignoni-Ponce, supra, at page 882. Here, the Government does not meet its burden of showing that the stop was properly premised upon articulable suspicion.

III.

THE SECOND STOP WAS ILLEGAL

Contrary to the Government's next argument, there is no basis for initiating a second detention two hours later, with the subsequent search of the vehicle. Once again, law enforcement had failed to marshal "specific articulable facts" that created a reasonable suspicion that the person stopped had been, is, or is about to be engaged in criminal activity. . United States v. Cortez, (1981) 449 U.S. 411, 417; United States v. Brignoni-Ponce, (1975) 422 U.S. 873, 884.

Turning to the facts of this case, it is defendant AVETYANTS' position that the second detention was not

1 justified. The defendant's conduct, being in a park and
2 standing next to the car, yielded nothing suspicious, and did
3 not give rise to any specific articulable facts that he was
4 engaged in criminal activity.

5 It is noteworthy that the Government seems to engage in
6 fact finding to analyze the efficacy of the second detention.
7 Again, Agent Stallings was present in close proximity of Agent
8 Zoetewey while the latter was conducting the immigration
9 inspection on the defendants. Agent Stallings had no basis for
10 suspecting the immigration status of the defendants where he
11 was clearly aware that two hours earlier Agent Zoetewey was
12 satisfied with the immigration status of defendant AVETYANTS,
13 and the co-defendants.

14 Under the facts of this case, no valid and articulable
15 suspicion could have been formed by Agent Stallings. The
16 general characteristics pertaining to defendant AVETYANTS
17 provide an insufficient basis for a detention.

18 19 IV.

20 THE ABSENSE OF CONSENT MANDATES SUPPRESSION OF THE 21 FRUITS OF THE ILLEGAL SEARCH OF THE VEHICLE

22 While a show of physical force certainly demonstrates a
23 show of authority, the absence of such force does not
24 automatically determine whether a reasonable person feels free
25 to leave. United States v. Beraun-Panaez, (9th Cir. 1987) 812
26 F.2d 578.

27 Because the detention was illegal, the warrantless search
28 of his car which followed was not supported by probable cause.

1 Defendant AVETYANTS' purported "consent" was vitiated by the
2 oppressive and intimidating atmosphere created by Agent
3 Stallings, which could only lead a reasonable person to believe
4 that he was not free to refuse to have the vehicle searched.

5
6 **V.**

7 **CONCLUSION**

8 Based on the foregoing, defendant AVETYANTS respectfully
9 requests that this Court order:

10
11 1. That the evidence obtained, including the defendant's
12 alleged statements to the Border Patrol Agents at the time of
13 the initial stop as well as the second stop, be suppressed, as
14 the Government cannot meet its burden of showing that the
15 detentions, the questioning of the defendant and subsequent
16 search of the vehicle was lawful;

17 In the alternative, defendant AVETYANTS respectfully
18 requests that this Court order:

19
20 2. An evidentiary hearing, at which time the Government
21 must meet its burden showing that the detention was lawful, and
22 that the alleged consent to the search of the defendant's car
23 was freely and voluntarily given; and

24
25 3. That Border Patrol Agent Zoetewey and Agent Stallings
26 appear at the evidentiary hearing for the purpose of providing
27 testimony; and, that the Border Patrol Agents bring with
28

1 themselves their Standard Training Manual and all records of
2 in-service training to the hearing.

3 Dated: September 3, 2008

Respectfully submitted,

4
5 /s/ Garo B. Ghazarian

GARO B. GHAZARIAN

6 Attorney for Defendant

7 ARA E. AVETYANTS
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28